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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1713

DANIEL O. ALSTON,

Petitioner,

v.

ALLEGHENY-LUDLUM STEEL CORPORATION,
A Division of Allegheny Ludlum Industries, Inc.,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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Respondent.

PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the Court of Appeals for the Third Circuit has not yet been officially reported and is reproduced herein as Appendix A. The opinion of the United States District Court (Rosenberg, District Judge) is reproduced herein as Appendix B.

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on February 16, 1979 (Aldisert Adams & Higginbotham). The jurisdiction of this Court is invoked under Sec. 702 Title VII (42 U.S.C.A. § 2000e-2) of the Equal Employment Opportunities Division of the Civil Rights Law enacted by Congress on July 7, 1964 and also under the Civil Rights Act of 1860 as amended in 1870 (42 USCA § 1981 and § 1983).

Questions Presented for Review

1. Is the Statute of Limitations applicable against asserting a cause of action where an employee charges racial discrimination during his tenure of employment which allegedly continues each month following his retirement and receipt of a pension presumably lower in amount than that which he would have received had there been no employment discrimination and would have either been promoted or given a higher paying job in accordance with his ability and training.

2. Is the employer's pension system neutral in operation wherein the employee alleges discrimination during his tenure of employment and his pension checks are accordingly lower in amount than such sum as he would have received had he been promoted or given proper seniority status or given higher paying duties absent racial discrimination.

Statement of the Case

The complaint was filed on January 30, 1978, and avers that the Plaintiff is a black man; that he entered the employment of the Defendant on December 28, 1928; that his employment continued until his retirement on August 4, 1969, during which time his employment had been interrupted by a leave of absence to serve in the United States Army from 1943 to 1945, and an additional leave of absence to secure a degree from Bluefield State College in 1947 to 1950, from which college he graduated with honor and a Bachelor of Science degree in commercial education; that he holds a Masters degree from the University of Pittsburgh; that prior to his induction into the Army, he had been doing general labor work under the jurisdiction of a contract between the Defendant and the United Steelworkers of America after 1936; that being employed as a laborer, and upon his return from military service on July 12, 1945, he was employed as an electrical grinder operator until 1947, when he obtained a leave to attend Bluefield State College; that he returned to his employment with the Defendant in 1950 and successfully bid for the job of craneman; that during the years 1963 to 1966, he was partially unemployed by reason of eye surgery and upon his return was directed to do general labor because of his impaired vision and because of leg wounds incurred in the United States Armed Service; that upon his return from college he had made innumerable applications for supervisor or foreman, but his applications were ignored or rejected because of racial discrimination, although he was well qualified because of experience, training and ability to handle the work, and although many promotions were made in preference to Caucasians who were less competent or experienced; that in 1963 to 1969 janitor maintenance was the only employment available to him until he retired in 1969; that after applying

for aid through the Union Grievance procedure, he was advised that he had no remedy; that the Defendant throughout his tenure of employment informed the Plaintiff it would give him an opportunity for advancement while at the same time indicated it would be necessary for him to take a battery of tests; that the Plaintiff refused to take the tests because they were not generally given to applicants for promotion, and such tests were specifically created, if at all, as "being illusory and discriminatory"; that the Plaintiff secured employment with the Pittsburgh Board of Education and retired from that employment in 1976; that after May 30, 1950 until his retirement, he had been competent and qualified to be promoted to foreman or supervisor with an increase in salary but his efforts for promotion were ignored as a discriminatory practice on account of his color; that had he been advanced in accordance with his capabilities and had he received the available promotions, his pension would have been based on his salary and would have been much larger upon his retirement; that as a result he lost a considerable sum of money based upon loss of salary in promotions to which he was entitled; that he is entitled to treble damages as a result thereof and an increase in pension such as he would have received or additional compensations, punitive damages, counsel fees, costs and expenses; and that this court has jurisdiction of the matter under 42 U.S.C. § 2000e-2 of Title VII of the Equal Opportunity statute and under the Civil Rights Act, 42 U.S.C. § 1981 and § 1983.

The Defendant moves to dismiss, arguing that the complaint fails to state a claim upon which relief can be granted: (1) under 42 U.S.C. § 1983, because it fails to allege action under color of state law or state authority; (2) under Article 1, § 28 of the Pennsylvania Constitution; because it fails to support a cause of action based on sex discrimination; (3) under

42 U.S.C. § 1981 because it is barred by the applicable Statute of Limitations, and additionally because it fails to allege racial motivation and fails to specifically plead facts from which a court may infer discrimination; and (4) under 42 U.S.C. § 2000e-1 *et seq.*, because timely charges were not filed with the EEOC, a jurisdictional prerequisite to a Title VII action. The Defendant also attacks an Amended Complaint which seeks as an additional remedy a class action.

The principal issue to which argument and briefs for both the Plaintiff and Defendant primarily addressed themselves, is the timeliness of the assertion of claims under 42 U.S.C. § 1981 and 42 U.S.C. § 2000e, *et seq.* Basically the Plaintiff claims two different forms of discrimination in regard to his employment with Allegheny Ludlum. First, the operation (from 1950 to 1969) of a racially discriminatory promotion system; and second, the operation of the Defendant's pension system under which the Plaintiff currently receives monthly benefits.

REASONS FOR GRANTING THE WRIT

I. The court below erred in deciding the case on *Masco vs. United Airlines*, 574 Fed. 2d 1127 (3rd Cir.) 1978.

In its judgment order (without oral argument) the Court of Appeals based its decision on *Masco vs. United Airlines*, 574 F.2d 1127 (3d Cir. 1978). In *Masco* female flight attendants failed to file proceedings within 180 days in accordance with a Title VII action having been denied reinstatement at the end of their maternity leaves, the Court holding that subsequent and repeated requests for re-employment did not constitute a continuing present violation. It would appear that there was no overt action by the employer except to deny re-employment. The lower court held that a case had been made out when the employer distinguished between maternity

leaves and temporary disability leaves. *Evans v. United Airlines* was decided on May 31, 1977 and held that when the pension system was neutral in operation, a case for discrimination could not be made out.

The instant case is grounded on the theory that the operation of the employees' pension system produced monthly checks based on the failure to accord the employee equal rights, denying the same on account of his color. Counsel urges it would be tenuous to argue that the pension system operated fairly to all employees when in fact affected by discriminatory practices resulting in lower pensions upon retirement.

Although *Masco* was distinguished from *Jurinko v. Wiegand* (477 Fed. 2d 1038 (3d Cir.), vacated and remanded at 414 U.S. 970) which held that each request for re-employment after termination is a separate discrimination. Appositely receipt of each monthly pension check in reduced sum is a mute protest against the amount thereof which has been determined on the basis of a lower wage scale to the employee founded on discriminatory practices. We are here concerned with effects of the discrimination.

II. The lower court erred in holding that each pension check received by the employee discriminated against is not a separate and continuing violation.

In the case *sub judice* the lower court held that the Complaint failed to state a cause of action under 42 U.S.C.A. Sec. 1981 because it is barred by the applicable Statute of Limitations and additionally because it fails to allege racial motivation and fails to specifically plead facts from which a court may infer discrimination; and under 42 U.S.C. Sec. 2000e-1 *et seq.*, because timely charges were not filed with the

EEOC, a jurisdictional prerequisite to a Title VII action. The lower court conceded, however, that the limitations under Section 1981 would have been six years from the last day of employment namely *viz.*, August 4, 1969. The suit was filed on January 30, 1978. The lower court held that the appellant did not seek a modification of the existing pension system, but rather an increase in his monthly pension check based on such additional compensation as he would have received absent discrimination. The Complaint averred that the Appellant was discriminated against because of his color, *a fortiori*.

Memorandum of Authorities in Support of Petition for Certiorari.

In *Cates vs. TWA*, 561 F.2d 1064 (Aug. 5, 1977), it was held that where no charge was filed with the EEOC within 180 days after the alleged unlawful employment practice had occurred and no charges were made of discrimination or that the seniority system was not bona fide, the claim that the Plaintiff's seniority were lower than proper because of the perpetuation of prior discrimination, did not charge a present violation of Title VII of the Act of 1964. In *Cates*, suit was filed both under Title VII and Sec. 1981, the Defendants averring that the suits were untimely. The former because no charge was filed with the EEOC within 180 days and the latter because the applicable three-year Statute of Limitations (in New York) barred the action. The motions to dismiss were denied since the complaint on its face said that there was a pattern of racial discrimination which continued to date and further that the Sec. 1981 claim was not barred. Following the denial of motion by the Defendant to dismiss, the Plaintiff amended twice and motion to dismiss was again made by the Defendant. Relying on *Collins vs. United Airlines*, 514 F.2d 494, 9th Cir. 1975, the second amended complaint alleged

subsequently that since TWA had been doing business until 1970 it had failed and refused to hire qualified blacks as flight personnel because of their race and that the date-of-hire seniority system adversely affected present flight crew members, many of whom had not been hired at the time of their initial application solely because of their race.

The lower court held that the charges with the EEOC were filed on March 24, 1972. Citing *Acha vs. Beame*, 531 F.2d 648 (2d Cir. 1976), and *Franks vs. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), the district court began its analysis of what it termed the seniority claim:

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> In *United Air Lines, Inc. v. Evans, supra*, decided after oral argument in this case, the Court clarified its *Franks* holding in a case which is largely dispositive of the question at hand.

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> While *Evans* acknowledged that it was too late to obtain relief based on a 1968 unlawful employment practice, she argued, like appellants here, that *United* was guilty of a present, continuing violation of Title VII, and that therefore her claim was timely. She claimed that *United* illegally discriminates against her since the seniority system gives present effect to the past illegal act and therefore perpetuates the consequences for forbidden discrimination. 97 S.Ct. at 1888.

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. . . . . .

> Respondent emphasizes the fact that she has alleged a *continuing* violation. *United's* seniority system does indeed have a continuing impact on her pay and fringe

> benefits. But the emphasis should not be placed on mere continuity; the critical question is whether any present violation exists. *She has not alleged that the system discriminates against former female employees or that it treats former employees who were discharged for a discriminatory reason any differently than former employees who resigned or were discharged for a non-discriminatory reason.* In short, the system is neutral in its operation (Emphasis supplied) 97 S.Ct. at 1889.

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> Finally, Justice Stevens noted that since *Evans* did not challenge the bona fides of *United's* seniority system, and did not allege that the system was intentionally designed to discriminate because of race, color, religion, sex, or national origin, § 703(h) is an additional ground for rejecting her claim:
>
> > The statute does not foreclose attacks on the current operation of seniority systems which are subject to challenge to a neutral system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer. A contrary view would substitute a claim for seniority credit for almost every claim which is barred by limitations. Such a result would contravene the mandate of § 703(h).
>
> 97 S.Ct. at 1890.

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Clearly, *Cates* is distinguished on its facts from the case at bar.

It does not require a strained interpretation of the law to hold that where there is a continuing violation, the statute begins to run with each violation. And it would appear that if the claimant's monthly pension has been diminished or decreased because of the denial of promotional opportunities and seniority, each month would create a separate cause of action. We shall see later that the applicability of a limitations statute under § 1981 was merely a matter of judicial convenience and it could be inferred that Congress intended that there be no statute of limitations in cases brought under this action:

> *Kennan vs. Pan Am World Airways*, 424 F.Supp. 721, 1976.
>
> *Macklin vs. Spector Freight System*, 478 F.2d 979.
>
> *Franks vs. Bowman Transportation Co., supra*, 424 U.S. at 768 n.28, 96 S.Ct. at 1266.

Conclusion

It is respectfully submitted that the Writ of Certiorari should be granted.

Respectfully submitted,

SAMUEL J. GOLDSTEIN,
Attorney for Petitioner.

APPENDIX A

Opinion of District Judge Rosenberg of the United States District Court for the Western District of Pennsylvania.

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

DANIEL O. ALSTON

v.

ALLEGHENY LUDLUM STEEL CORPORATION, DIVISION OF ALLEGHENY LUDLUM INDUSTRIES, INC.

Civil Action No. 78-94

ROSENBERG, *District Judge*

The matter here before me is on a motion of the defendant, Allegheny Ludlum Steel Corporation, Division of Allegheny Ludlum Industries, Inc., to dismiss the complaint filed by a former employee, Daniel O. Alston.

The complaint was filed on January 30, 1978, and avers that the plaintiff is a black man; that he entered the employment of the defendant on December 28, 1928; that his employment continued until his retirement on April 4, 1969, during which time his employment had been interrupted by a leave of absence to serve in the United States Army from 1943 to 1945, and an additional leave of absence to secure a degree from Bluefield State College in 1947 to 1950, from which college he graduated with honor and a Bachelor of Science degree in

commercial education; that he holds a Masters degree from the University of Pittsburgh; that prior to his induction into the army, he had been doing general labor work under the jurisdiction of a contract between the defendant and the United Steelworkers of America after 1936; that being employed as a laborer, and upon his return from military service on July 12, 1945, he was employed as an electrical grinder operator until 1947, when he obtained a leave to attend Bluefield States College; that he returned to his employment under the defendant in 1950 and successfully bid for the job of craneman; that during the years 1963 to 1966, he was partially unemployed by reason of eye surgery and upon his return was directed to do general labor because of his impaired vision and because of leg wounds incurred in the United States Armed Service; that upon his return from college he had made innumerable applications for supervisor or foreman, but his applications were ignored or rejected because of racial discrimination, although he was well qualified because of experience, training and ability to handle the work, and although many promotions were made in preference to caucasians who were less competent or experienced; that in 1963 to 1969 janitor maintenance was the only employment available to him until he retired in 1969; that after applying for aid through the Union Grievance procedure, he was advised that he had no remedy; that the defendant throughout his tenure of employment informed the plaintiff it would give him an opportunity for advancement while at the same time indicated it would be necessary for him to take a battery of tests; that the plaintiff refused to take the tests because they were not generally given to applicants for promotion, and such tests were specifically created, if at all, as "being illusory and discriminatory"; that the plaintiff secured employment with the Pittsburgh Board of Education and retired from that employment in 1976; that after May 30, 1950 until his retirement, he had been competent and qualified to be promoted to foreman or supervisor with an increase in salary but his efforts for promotion were ignored as a discriminatory practice on account of his color; that had he been advanced in accordance with this capabilities and had he received the available promotions, his pension would have been based on his salary and would have been much larger upon his retirement; that as a result he lost a considerable sum of money based upon loss of salary in promotions to which he was entitled; that he is entitled to treble damages as a result thereof and an increase in pension such as he would have received or additional compensations, punitive damages, counsel fees, costs and expenses; and that this court has jurisdiction of the matter under 42 U.S.C. § 2000e-2 of Title VII of the Equal Opportunity statute and under the Civil Rights Act, 42 U.S.C. § 1981 and § 1983.

The defendant moves to dismiss, arguing that the complaint fails to state a claim upon which relief can be granted: (1) under 42 U.S.C. § 1983, because it fails to allege action under color of state law or state authority; (2) under Article 1, § 28 of the Pennsylvania Constitution, because it fails to support a cause of action based on sex discrimination; (3) under 42 U.S.C. § 1981 because it is barred by the applicable Statute of Limitations, and additionally because it fails to allege racial motivation and fails to specifically plead facts from which a court may infer discrimination; and (4) under 42 U.S.C. § 2000e-1 *et seq.*, because timely charges were not filed with

the EEOC, a jurisdictional prerequisite to a Title VIII action. The defendant also attacks an Amended Complaint which seeks as an additional remedy a class action.

The principal issue to which oral argument and briefs for both the plaintiff and defendant primarily addressed themselves, is the timeliness of the assertion of claims under 42 U.S.C. § 1981 and 42 U.S.C. § 2000e, *et seq.* Basically the plaintiff claims two different forms of discrimination in regard to his employment with Allegheny Ludlum. First, the operation (from 1950 to 1969) of a racially discriminatory promotion system; and second, the operation of the defendant's pension system under which the plaintiff currently receives monthly benefits.

Section 1981[1] has been recognized in this Circuit as creating a cause of action for alleged employment discrimination. *Young v. Intern'l. Telephone & Telegraph Co.*, 438 F.2d 757, C.A.3, 1971. Since this statute provides no period of limitations, it is necessary to refer to the appropriate period stated in a statute of local application. *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979, C.A.D.C., 1973, at page 994. Such a cause of action must be brought at least within six years from the date on which such cause accrued. *Meyer v. Pennpack Woods Home Ownership Assn.*, 559 F.2d 894, C.A. 3, 1977.

[1] 42 U.S.C. 1981 provides that: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Similarly, under the terms of 42 U.S.C. § 2000e *et seq.*,[2] a plaintiff may not bring suit in a district court unless a charge has been filed with the Equal Opportunity Commission within 180 days of the occurrence of the alleged unfair practice. The timely filing of charges with the EEOC and the timely filing of suit thereafter are "jurisdiction" facts. *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, C.A. 3, 1975, cert. den. 421 U.S. 1011 (1975). Any failure to comply with 42 U.S.C. § 2000e-5(e) deprives a district court of subject, matter jurisdiction. *DeGideo v. Sperry-Univac Company*, 415 F.Supp. 227 (E.D.Pa. 1976). See also, *Kutska v. California State College Department*, 410 F.Supp. 48, 49-50, n.1. (W.D.Pa. 1976), aff'd. 549 F.2d 795, C.A. ....., 1977; *Macklin, supra*, at page 986.

This is settled law and the plaintiff does not challenge it, only its application to the facts at hand.

In regard to the refusal to promote the plaintiff, I find the last date on which the plaintiff could have been illegally refused promotion and discriminated against was on the last day of his employment with the defendant corporation on August 4, 1969. Since the plaintiff failed to institute any action within the six-year statute of limitations (on or before August 4, 1975), and also failed to make this the basis of a timely charge with the EEOC within 180 days of his retirement date, this claim of the plaintiff is barred and must be dismissed.

[2] 42 U.S.C. § 2000e5(d) provides in part: "A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred. . ." 78 Stat. 260. The 1972 amendments to Title VII redesignated subsection (d) as (e). At the same time it was amended to enlarge the limitations period to 180 days. 42 U.S.C. § 2000e-5(e).

The plaintiff's second claim alleges that the operation of the defendant's pension system constitutes a continuing violation of both § 1981 and § 2000e *et seq.* (Title VII) in that the plaintiff is not receiving as much as he would have received if he had not been allegedly discriminated against in promotion, and therefore, that each monthly benefit the plaintiff does receive is the present effect of prior acts of discrimination.

A recent case, *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977) deals with an issue similar to that here being considered. Evans was employed by United as a flight attendant from November, 1966 to February 1968 at which time she married and was forced to resign because United maintained a policy of refusing to allow its female flight attendants to be married (which policy was subsequently found to be in violation of Title VII of the Civil Rights Act of 1964). Evans was rehired in February 1972 and in 1973 filed charges with the EEOC claiming that United had committed an unlawful employment practice by refusing to credit her with seniority for any period prior to February, 1971. No charge had been filed with the EEOC within the appropriate time period after the plaintiff was forced to resign in 1968.

The sole question for decision by the Supreme Court was whether United had committed a second violation of Title VII by refusing to credit her with seniority for any period prior to February, 1972. Evans argued, *inter alia*, that United's seniority system illegally discriminated against her in that it gave present effect to the past illegal act and therefore perpetuated the consequences of forbidden discrimination.

The majority of seven, through Justice Stevens, agreed with the appellant that the seniority system gave present effect to a past act of discrimination, but held that such a discriminating act must have been based on a timely charge before the Court could have adjudicated the question of remedy. The Court noted:

> "A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered. It is merely an unfortunate event in history which has no present legal consequences." 431 U.S. at page 558.

The Court continued:

> "Respondent emphasizes the fact that she has an alleged and *continuing* violation. United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity the critical question is whether any present *violation* exists. She has not alleged that the system discriminates against former female employees or that it treats former employees who were discharged for a discriminating reason any differently than former employees who resigned or were discharged for a nondiscriminatory reason. In short, the system is neutral in its operation." 431 U.S. at page 558.

The plaintiff, Alston, makes no allegations that the pension system discriminates against blacks, or that it treats the plaintiff any differently than whites who were in the same position as the plaintiff on retirement. In fact, the plaintiff does not seek a modification or elimination of the existing pension

system, but rather an increase in pension based on such additional compensation as he would have received had the defendant not discriminated in its hiring practice. However, it is evident that the pension system under which the plaintiff retired is neutral in operation just as was the seniority system in *Evans, supra.* In light of Evans, the plaintiff thus cannot use these pension benefits as a basis for a present unlawful employment practice.

> "[A] challenge to a neutral system may not be predicated in the mere fact that a past event which has no present legal significance has affected the past calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer." 431 U.S. at page 560.

Since the plaintiff had not challenged the alleged unlawful act or practice itself, he cannot now challenge any of its derivative effects. Upon retirement, the plaintiff was treated like any other pensioner by the defendant (regardless of the merits of its promotion system), and such conduct is not in violation of either § 1981 or § 2000e *et seq.* Therefore, its continued adherence to that policy is not illegal.

The plaintiff attempts to distinguish *Cates v. Trans World Airlines,* 561 F.2d 1064, C.A. 2, 1977 from the case at bar. In *Cates,* the appellants contended that a facially neutral date-of-hire seniority system violated Title VII insofar as it adversely affected victims of past discrimination. However, that Court noted the separateness of the issues of "violation" and of "remedy".

> "It is plain in the light of *Evans* and *Franks* that the Title VII claims of *Cates,* George & Whithead were not timely asserted. Those decisions sharply distinguish the issues of whether there has been a violation of Title VII and what the appropriate remedy is for such a violation; while the lower court decisions tended to mix the two questions together. Unless there is a timely charge which is proven to be a violation of Title VII, the question of remedy is never reached." 561 F.2d at 1072.

also

> "What was characterized as a second independent violation of Title VII, the seniority claim, was nothing more than the residual effect of a prior discriminatory refusal to hire, which could have been remedied had that past unlawful employment practice been timely asserted and proven." 561 F.2d at page 1072.

The plaintiff also states that the applicability of a limitation statute under § 1981 was merely a matter of judicial convenience and that it could be inferred that Congress intended that there was no statute of limitations in cases brought under this statute. The answer is that

> "The court in Evans also expressed its concern that any other result would prevent a claim from ever being barred by limitations . . . Similariy, were we to accept plaintiff's argument in this case, almost any time-barred discrimination in promotion could be raised by alleging that 'but for' that discrimination one would not be able to apply for positions for which one does not now have the experience qualification . . . To allow the charge to make timely all old incidents of discrimination is to defeat totally the concept of limitations." *Myles v. Schlesinger,* 436 F.Supp. 8 (1976) at page 15.

Any distinction between a challenged seniority system and pension system (under the continuing violation theory) was found unconsequential in *Freude v. Bell Telephone Co. of Pa.*, 438 F.Supp. 1059 (E.D.Pa. 1977). In that case, a retired employee brought suit under Title VII for alleged sex discrimination and asserted that continuing payments of pension benefits in an amount derived from an alleged sex discriminatory salary scale (attained during her employment) constituted discrimination which permitted her to file charges and bring suit after the applicable period of limitations had expired from the date of her retirement. The plaintiff conceded that her charge with the EEOC was not filed until thirteen months after her retirement.

In dismissing the plaintiff's argument, the Court held that:

> "The receipt by the plaintiff of payments received pursuant to a fair and sex neutral pension plan do not constitute a continuing violation tolling the statute even though the amount of pension payments is derived from a sex discriminatory salary scale. The latter fact, which was not made the basis of a timely charge, is, however regrettably 'an unfortunate event in history which has no present legal consequences." *Freude, supra,* at page 1061.

Under both *Evans, supra* and *Freude, supra,* the plaintiff does not charge a present violation under either § 1981 or Title VII. Since this court has no jurisdiction over time barred claims, I need not examine any other of the defendant's grounds to dismiss.

In order for a plaintiff to succeed under 42 U.S.C. § 1983[3] two elements must be present: (1) the conduct complained of must have been done or caused to have been done by a person acting under color of law; and (2) the conduct must have subjected the complainant to the deprivation of rights, privileges or immunities secured to him by the Constitution and laws of the United States. *Via v. Cliff,* 470 F.2d 271, 274 C.A. 3, 1972; *Meyer v. Lavelle,* 389 F. Supp. 972, 975 (E.D.Pa. 1975). Ordinarily, a private person or corporation cannot be held liable under 42 U.S.C. § 1983 unless his or its wrongful action was done under color of state law or state authority. *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345 (1974). Since the complaint fails to allege action under color of state law or state authority, the plaintiff's claim under 42 U.S.C. § 1983 must be dismissed.

Finally, the plaintiff, a black male, has failed to allege any facts to support a cause of action based on sex discrimination. In Article 1, § 28 of the Pennsylvania Constitution, it is provided that: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."

No allegation is made that females were promoted to positions for which the plaintiff was qualified. On the contrary the plaintiff solely alleges discrimination based on race. Therefore, the plaintiff's claim under Article 1, § 28 of the Pennsylvania Constitution, will also be denied.

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[3] 42 U.S.C. § 1983 provides that:
Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

APPENDIX B

Judgment Order Before Circuit Judges Aldisert, Adams and Higginbotham. Appeal from the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1887

DANIEL O. ALSTON,

Appellant,

vs.

ALLEGHENY LUDLUM STEEL CORPORATION,
Division of Allegheny Ludlum
Industries, Inc.

Appeal from the United States District Court
for the Western District of Pennsylvania
(D. C. Civil No. 78-0094)

Submitted Under Third Circuit Rule 12(6)
February 16, 1979

Before: ALDISERT, ADAMS and HIGGINBOTHAM, *Circuit Judges.*

After consideration of all contentions raised by appellant, and in light of our decision in *Masco v. United Airlines*, 574 F.2d 1127 (3d Cir. 1978), it is

Appendix B—Judgment Order Before Circuit Judges Aldisert, Adams and Higginbotham, Appeal from the United States Court of Appeals for the Third Circuit.

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

ALDISERT,
Circuit Judge.

Attest:
M. Elizabeth Ferguson
Chief Deputy Clerk
Dated: Feb 16 1979